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No. 97-189

In the Supreme Court of the United States

October Term, 1996

MOBILETEL, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES TO THE PROCEEDING

Respondents BellSouth Mobility Inc ("BellSouth") and Columbia Cellular, Inc. ("Columbia") concur in the listing of the parties to the proceeding contained in the petition for a writ of *certiorari*.

BellSouth is a wholly-owned subsidiary of BellSouth Cellular Corp. ("BSCC"), which is a wholly-owned subsidiary of BellSouth Mobile Systems, Inc. ("BMSI"). BMSI is a wholly-owned subsidiary of BellSouth Enterprises, Inc. ("BSE"), which is a wholly-owned subsidiary of BellSouth Corporation, a Georgia corporation headquartered at 1155 Peachtree Street, N.E., Atlanta, Georgia 30367. BellSouth Corporation, in turn, is a publicly held corporation and has equity securities in the hands of the public. BellSouth Corporation's wholly-owned subsidiaries have issued debt securities to the public as obligations of BellSouth Telecommunications, Inc., Southern Bell Telephone and Telegraph Company, South Central Bell Telephone Company, BellSouth Capital Funding Corp., BellSouth Savings and Security ESOP Trust, and BellSouth Savings and Employee Stock Ownership Trust. *See* Corporate Disclosure Statement filed in D.C. Cir. Case No. 96-1327, September 18, 1996.

Columbia has no parent, subsidiary, or affiliated company that has issued shares or debt securities to the public. An affiliate of Columbia, Reserve Telephone Company, Inc., provides landline exchange service in a portion of St. John the Baptist Parish in Louisiana. *See* Corporate Disclosure Statement filed in D.C. Cir. Case No. 96-1327, September 18, 1996.

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Respondents BellSouth Mobility Inc ("BellSouth") and Columbia Cellular, Inc. ("Columbia") hereby oppose the petition for a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit filed by MobileTel, Inc. ("MobileTel"). The petition seeks review of a judgment of the Court of Appeals that "easily" affirmed a decision of the Federal Communications Commission ("FCC" or "Commission") denying certain licenses to MobileTel on the ground that it was ineligble to apply for the licenses under its rules. BellSouth and Columbia were the other applicants for the licenses at issue and have formed a partnership to hold one of the two licenses.

OPINIONS BELOW

The relevant opinions and orders below are reproduced in the appendix to the petition. They are: *MobileTel, Inc. v. FCC,* 107 F.3d 888 (D.C. Cir. 1997) (App. 1a), *reh'g denied,* slip op. (D.C. Cir. Apr.

29, 1997) (unpublished) (App. 47a), *aff'g MobileTel, Inc.*, slip op. FCC 96-345, 4 Communications Reg. (P&F) 476, 1996 FCC LEXIS 4374 (Aug. 14, 1996) (App. 16a), *vacating MobileTel, Inc.*, 5 F.C.C.R. 5854 (Mob. Serv. Div. 1990) (App. 38a).

STATEMENT OF THE CASE

The FCC decision that was affirmed by the Court of Appeals involved the interpretation and application of an FCC rule. The rule at issue, 47 C.F.R. § 22.902(b) (1988), delineated two frequency blocks for cellular radio service and established the eligibility standards for applicants for the two blocks. Block A was reserved for companies "not also engaged in the business of affording public landline message telephone service," generally known as "non-wireline" carriers. Block B was reserved for companies "engaged directly or indirectly in the business of affording public landline message telephone service," or "wireline" carriers, and only "in those areas in which they provide such landline services in some portion of the cellular market."

The Petitioner, MobileTel, Inc. ("MobileTel"), is a wireline carrier, because it is a subsidiary of SJI, Inc. ("SJI"), the parent of Lafourche Telephone Company ("Lafourche"), which provides "public landline message telephone service" in certain areas of Louisiana. In particular, Lafourche provides landline telephone service in the southern part of the New Orleans cellular market and in the Houma-Thibodaux cellular market. Accordingly, Lafourche or an affiliate was eligible to apply for wireline cellular licenses in those markets.

No Lafourche affiliate applied for the New Orleans license when it was initially available, but SJI did apply for the Houma-Thibodaux license. It was awarded the Houma-Thibodaux license after successfully opposing a competing applicant's eligibility as a wireline carrier. SJI argued for the disqualification of Offshore Telephone Co. on the ground that Offshore did not provide landline telephone

service in the Houma-Thibodaux market.[1] Offshore provided only a microwave radiotelephone connection to its customers in that market. In response to the objections of MobileTel's parent, the FCC disqualified Offshore on the grounds that "[a]s a provider of radio service, Offshore does not comply with the plain meaning of the 'public *landline* service' requirement of Section 22.902(b) of the Rules."[2] But for this ruling, MobileTel would not hold the Houma-Thibodaux wireline license.[3]

In the instant case, the issue for the FCC was whether MobileTel was eligible for the B block frequencies in two specific cellular markets: Rural Service Areas designated as Louisiana 8-St. James ("LA-8") and Louisiana 9-Plaquemines ("LA-9"). The LA-8 cellular market consists of three parishes: St. James, St. John the Baptist, and St. Charles, all located to the west of New Orleans and northeast of the Houma-Thibodaux market. The LA-9 cellular market consists of Plaquemines parish, located to the southeast of New Orleans. Neither MobileTel nor its affiliates have telephone exchanges, pole lines, cables, or other conventional "landline" facilities for the provision of telephone service in either LA-8 or LA-9, and they do not serve any customers with wire- or cable-based telephone service in those markets.

MobileTel's claim to be eligible for the wireline licenses in these markets is premised solely upon the fact that it provides telephone service to a single customer location in each market by means of a radio link. Just before applying for the cellular licenses, Lafourche began serving just *one* telephone customer in each of these markets by radio, not by using wire lines. Lafourche did this by beaming a radio signal to the customer's premises from towers located at its telephone exchanges in Larose (in the Houma-Thibodaux market) and Grand Isle (in the New Orleans market), in each case several miles

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1 *Offshore Telephone Co.*, 2 F.C.C.R. 4575 (Mobile Services Div. 1987), *aff'd*, 3 F.C.C.R. 4601 (1988).

2 *Id.*, 3 F.C.C.R. at 4601 (emphasis in original).

3 MobileTel's parent, SJI, was named the licensee in 1987, after the staff's disqualification of Offshore. The license was subsequently transferred to MobileTel.

outside the boundaries of the LA-8 and LA-9 markets where the customers were supposedly being served. The LA-8 customer location was a vacation home in an unpopulated swampy area just across the border from the Houma-Thibodaux market, while the LA-9 customer location was an oil exploration platform in Barataria Bay, just beyond the border from the New Orleans market. Lafourche began providing this radiotelephone service *after* the FCC had ruled in the *Offshore* case that the provision of telephone service in a given market only by means of radio does not constitute the provision of landline telephone service in the market and does not qualify the company for the B block frequencies in that market.

The FCC unanimously determined that the radiotelephone service provided by Lafourche did not qualify MobileTel for the B block frequencies in LA-8 and LA-9 because it did not establish a "landline" presence in the relevant markets. It also found that the purposes underlying the eligibility rule would not be served by allowing MobileTel to apply. Finally, the Commission found MobileTel had clear notice of the eligibility requirements, citing *Offshore* and other decisions. (App. 16a.)

MobileTel appealed to the United States Court of Appeals for the District of Columbia Circuit, which "easily" affirmed the FCC's decision. (App. 1a, 12a.) The Court of Appeals found the case a completely unexceptional administrative licensing decision involving an agency's reasonable and foreseeable interpretation of its rules in accordance with their literal terms. The Court stated:

> In this case, MobileTel itself describes the Commission's construction of the term "landline" as "literalistic," . . . suggesting that MobileTel's notice argument is premised on the extraordinary assertion that a "good faith" applicant trying to give the regulation a "fair reading" would not have understood that the term "landline" was to be read "literally." What makes it even more implausible that MobileTel could have misunderstood the term "landline" is the fact that only two months before Lafourche set up BETRS links in St. James and Plaquemines, the Commission had announced in *In*

> *re Application of the Offshore Telephone Co.*, 3 FCC Rcd 4601 (1988), that the provision of exclusively *radio*-based service in an RSA does not render a company eligible for the "wireline set-aside" frequencies in that RSA. (MobileTel was even better situated to mark the significance of the *Offshore* decision than were other "good faith" readers of the Commission's regulation, because MobileTel's parent SJI, Inc. was a party to the *Offshore* case.)
>
> Because we believe a good faith prospective applicant for the Block B frequencies in the St. James and Plaquemines RSAs would, upon giving § 22.902(b) of the Commission's regulations a fair reading, have understood that the provision of only BETRS-based service in these RSAs would not create eligibility for these frequencies, we reject MobileTel's notice argument.

(App. 13a-14a.) The Court of Appeals issued its mandate on March 7, 1997.

MobileTel sought rehearing. On April 29, 1997, the Court of Appeals denied rehearing, indicating that:

> MobileTel did not articulate the argument that it now claims this court overlooked until the oral argument, but our decision nevertheless adequately addressed this argument.

(App. 47a.) MobileTel now seeks issuance of a writ of *certiorari*.

REASONS FOR DENYING THE WRIT

I.

MobileTel's petition for a writ of *certiorari* should be denied, in the first instance, because the question presented in the petition

cannot fairly be decided on the record of this case. MobileTel frames the question presented as follows:

> When a federal agency adopts a new analytical approach to determining whether a regulated entity falls into an existing regulatory classification, such as eligibility for licenses issued by the agency under its regulations, which approach causes substantial, irreparable harm to applicants deemed to be ineligible, does this Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983) and its progeny require the agency to at least acknowledge and support the departure with a reasoned explanation on the administrative record?

This question is not presented by the record here for the following reasons. First, the FCC did not "adopt[] a new analytical approach." It interpreted its regulation in precisely the same way it had interpreted the same regulation in a previous decision, *Offshore*. (App. 29a.) The Court of Appeals correctly observed that the case involved no departure from precedent. Second, the FCC provided a reasoned explanation for its interpretation that addressed its prior interpretations of the rule at issue and similar rules, as well as the purposes of such rules. (App. 27a-34a.) Third, no issue concerning the extension of *State Farm* and its progeny, which concern judicial review of rulemaking decisions, to adjudications was ever raised below by MobileTel[4] or was decided by the Court of Appeals.[5]

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[4] MobileTel did not cite *State Farm* in its brief or reply brief to the Court of Appeals, and accordingly the court's opinion did not address the extension of *State Farm* to adjudicative rule interpretations. The first time MobileTel cited *State Farm* to the Court of Appeals was in its petition for rehearing, where it relied on *State Farm* and other cases for the principle that an agency changing its course must provide a reasoned explanation. *See* MobileTel Petition for Rehearing at 4, 11 (filed April 21, 1997).

[5] The Court of Appeals did not need to address *State Farm* in its denial of rehearing because the court the FCC's decision was consistent with agency precedent.

Accordingly, the petition should be denied. *See* SUP. CT. R. 14.1(a), 14.4, 15.2.

II.

Assuming *arguendo* that this case involved a departure from prior rule interpretations, MobileTel's petition still fails to raise an issue of any consequence. MobileTel claims that this case presents an "important question" regarding "requir[ing] federal agencies to provide a reasoned explanation when adopting new or different interpretations of existing regulations." (Pet. 11.) There is no doubt, however, that when an agency changes course—whether by rule-making or rule interpretation—the courts require it to acknowledge that fact and provide a reasoned explanation. In fact, the leading cases cited by MobileTel demonstrate this point: *State Farm*, 463 U.S. at 42, 57 (requiring explanation when rule rescinded through rulemaking); *Atchison, Topeka, and Santa Fe Ry. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973) (in adjudication, agency has "duty to explain its departure from prior norms . . . clearly so that the reviewing court can understand the basis of the agency's action"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (requiring "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored"), *cert. denied*, 403 U.S. 923 (1971). MobileTel cites no inconsistent or inconclusive case law that suggests a need for clarification.[6] Accordingly, there is no important federal question or conflict among the circuits warranting grant of the petition.

Moreover, the Court of Appeals below did not depart from this principle, for the simple reason that there was no departure from prior interpretations that required an explanation. The only prior decision by the FCC interpreting the very same part of the same regulation was *Offshore*, in which the FCC reached precisely the same result as

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[6] MobileTel urges this Court to grant a writ of *certiorari* so as "to provide guidance to the Courts of Appeal [sic]" regarding the need for consistency or explanation with respect to rule interpretations in particular. (Pet. 16.) No such guidance is needed, however. MobileTel cites decisions from the First, Fifth, Seventh, and Ninth Circuits holding that agencies changing their prior intepretations of rules must provide a reasoned explanation, but no decisions to the contrary. (Pet. 15 & n.5 (citing cases).)

here. Not surprisingly, MobileTel's petition fails to cite *Offshore*, the one prior decision directly on point. It was *this* decision the Commission was obliged to follow, unless it had a reasoned explanation for doing otherwise. No other previous Commission decision involved the question of whether the provision of telephone service exclusively via radio technology instead of wire lines constituted "landline" telephone service, for purposes of wireline cellular eligibility under § 22.902(b). Accordingly, there was no departure from prior interpretations to explain.

MobileTel attempts to create an inconsistency by reciting numerous prior intepretations of the phrase "public landline message telephone service" that did not distinguish between radio and wire lines and focused on the simple provision of telephone exchange service. (Pet. 16-19.) In none of these cases, however, did the FCC consider the issue of wire- versus radio-based exchange service in construing the phrase, so the pre-*Offshore* decisions simply did not address the issue.[7] Moreover, the decisions cited by MobileTel as supposedly inconsistent did not involve a rule that granted a wireline company eligibility only "in those areas in which they provide *such landline services* in some portion of the cellular market," as was the case here.[8] Thus, the Commission did not depart from those previous decisions when it ruled on MobileTel's eligibility, but rather its decision took into account a factor that had not been present in the earlier decisions. Simply put, there was no inconsistency or change in interpretation that needed to be explained.

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[7] For example, in *Xerox Corp.*, 90 F.C.C.2d 547 (1982), the issue before the Commission was whether MCI, a long-distance telephone company, was engaged in the provision of public landline message telephone service. The Commission held that MCI was not, because it provided only long-distance, and not local exchange, telephone service. There is no indication in the order that the technology used to provide service was considered, but whether MCI used wire or radio technology would not have changed the result in that case, because it did not provide local exchange service, regardless of technology. The Court of Appeals actually found the Commission's decision "consistent with *Xerox*, because . . . (as in the action under review) the Commission had considered the policies underlying its regulations in order to determine how the regulations should be construed." (App. 48a.)

[8] 47 C.F.R. § 22.902(b) (1988).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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